IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-816633-D2 AND ALL OTHER SEAMAN DOCUMENTS

Issued to: MENDEL H. BARTON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1553

MENDEL H. BARTON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 26 October 1965, an Examiner of the United States Coast Guard at Long Beach, California suspended Appellant's seaman's documents for 3 months outright plus 3 months on 6 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as and A.B. seaman on board the United States SS GIBBES LYKES under authority of the document above described, Appellant

(1)wrongfully failed to perform dutiess on 26 August 1965, from 1600 to 1900;

(2) wrongfully failed to join the vessel at 1900 on 26 August 1965, remaining so absent until 31 August 1965;

(3) wrongfully absented himself from the vessel from 1500 on 10 September to 1815 on 11 September, 1965;

(4) wrongfully absented himself from the vessel from 2400, 11 Septemer 1965, to 0615, 13 September 1965.

At the hearing, Appellant did not appear, although properly served. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence records of the ship. Since the proceedings were conducted in absentia there was no defense.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner entered an order suspending all documents issued to Appellant for a period of 3 months outright plus 3 months on 6 months' probation.

The entire decision order was served on 1 November 1965. Appeal was timely filed on 12

November 1965.

FINDINGS OF FACT

During the periods covered by the specifications herein, Appellant was serving as an A.B. seaman on board the United States SS GIBBES LYKES and acting under authority of his document.

Appellant absented himself without authority at 1600, 26 August 1965, in Cam Ranh, Viet Nam. He remained absent and failed to join the vessel when it sailed that night at 1900. He rejoined the vessel at 1030, 31 August 1965, at Qui Nhon, Viet Nam.

He was absent without authority from about 1500 on 10 September 1965 to 1200 on the 11 September 1965, at Cam Ranh. After returning at 1200 on 11 September, he immediately went ashore again without authority and remained absent until 1815 the same day.

About midnight that night he again left the ship without authority and did not return until 0615 on 13 September. He failed to perform duties on 13 September 1965, asserting to the mate that he was too sick. When Appellant was "logged" for failure to work he told the master that he was too sick and this reply was entered in the OfficialLog-Book.

On and after 10 September 1965, Appellant was on notice that shore leave privileges were denied at Cam Ranh by military authorities.

BASES OF APPEAL

The appeal in this case is in the nature of a plea for clemency on the grounds that Appellant was under unusual strain at the time of the offenses because his wife was ill. It is also urged that his failure to joint at Cam Ranh was unintentional, since a sailing board had not been posted when he first went ashore, and the general belief was that the vessel would remain at Cam Ranh Bay for several days.

OPINION

The evidence in the record confirms Appellant's assertion that a sailing board had not been posted the first time he went ashore at Cam Ranh Bay. But the board was posted prior to the time that Appellant was due back for his watch at 1600. Had he fulfilled his watch obligation he would have known of the sudden notice to sail.

It must also be observed that conditions at Cam Ranh Bay at the time in question were such that emergency movements of vessels could well be expected.

As to Appellant's failure to work, as alleged and found proved in the Fifth Specification, there is nothing in the record to support a view that the failure to perform duties was wrongful in the sense

of R.S. 4450. His immediate statement to the mate was that he was sick. His statement to the master for the Official Log-Book was that he was sick. There is no evidence in the record, whatever suspicion may exist, that the "sickness" was the result of intoxication.

The first specification of the charge here alleged originally that Appellant had failed to perform duties from 1600 to 2000 on 26 August 1965, a period when he should have been on watch. Noting that the vessel had sailed at 1900, the Examiner, on the record, stated his intention to avoid multiplicitous treatment of offenses, and, since the failure to join occured at 1900, he amended the First Specification to terminate the failure to perform duties at 1900, while finding proved the wrongful failure to join at 1900 in Specification Two.

It appears to me that this procedure does not avoid the multiplicitous treatment as the Examiner intended. Wrongful failure to join is predicated upon an unauthorized at the time of sailing. The unauthorized absence occurred only because Appellant, who had been ashore with authority, was not back to perform his duties at 1600. Thus non-performance of duties and the unauthorized absence from 1600 to 1900 were the same offense, and the unauthorized absence itself is the predicate for the wrongfulness of the failure to join.

I believe that the correct way to avoid improper multiplication of charges here is simply to treat the acts as one offense, -- wrongful failure to join.

After this consideration, it is noted that in addition to alleging a wrongful failure to join, the Second Specification goes on to allege that Appellant "did remain so absent" until the fifth day after he missed the ship.

When a seaman rejoins a vessel after missing a sailing it seems entirely proper for a master to make suitable deductions from his wages for the time missed. But in suspension and revocation proceedings the duration of the absence from the vessel after the failure to join is immaterial as an element of the offense. It is true that a rapid rejoining of his vessel may be considered a mitigating factor for the seaman, but the offense of wrongful failure to join is a single act. It is completed when it happens and it does not matter, in law, whether the seaman ever rejoins the vessel.

Thus, while a seaman may be heard to urge rapid return in mitigation, the specification of wrongful failure to join should not allege the length of absence which is not an element of the offense. The offense becomes no greater because the seaman may never have caught up to the ship again.

CONCLUSIONS

I conclude, upon this opinion, that Appellant was shown to have committed three separate offenses, not five.

He wrongfully failed to join at Cam Ranh Bay on 26 August 1965.

He twice absented himself without authority at Cam Ranh Bay on 10 and 11 September 1965 in violation of military port regulations and master's orders.

Some modification of the Order of Suspension is appropriate, but not much, because of the nature of the operation of the vessel upon which Appellant, with bonus pay, was employed.

ORDER

The findings of the Examiner are MODIFIED to reflect that the charges found proved against Appellant are that he wrongfully failed to join GIBBES LYKES on 12 August 1965 at Cam Ranh Bay, Viet Nam, and that he twice absented himself from the vessel without authority, at the same place on 10 and 11 September 1965, the second absence being of two days' duration.

The order of the Examiner is MODIFIED to provide for a period of outright suspension of Appellant's documents for two months instead of three months. In all other respects the decision and order of the Examiner entered at Long Beach, California, on 26 October 1965, are AFFIRMED.

E. J. ROLAND
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 18th day of May 1966.

INDEX